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Mediation as a "Negotiated Justice"

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Abstract: Mediation is a structured process, in which a neutral and impartial third party, who has no decision-making power regarding the resulting solution, assists the parties in finding their own solutions to resolve the dispute. Mediation is based on the trust that the parties place in the mediator, as a person capable of facilitating negotiations between them and supporting them in resolving the conflict, by obtaining a mutually convenient, efficient and sustainable solution. The classical resolution of the conflict by referring it to the judicial authorities (police, prosecutor's office, justice) often does not satisfy the interests of the parties, because it is a solution based on the winner-loser concept. Instead, resolving the conflict through mediation is the fruit of the meeting of the will of the parties. No one comes to impose their solution, therefore, the parties are the only ones in a position to decide. The role of the mediator is to facilitate the creation of a communication corridor between the parties, through which they can become aware of the best solution to the conflict between them. The mediation activity is performed equally for all persons, regardless of race, color, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin. The parties, individuals or legal entities, can resort to mediation without appealing to the judicial or arbitral bodies that will be relieved of numerous cases having as their object the settlement of misunderstandings between the parties. In conclusion, mediation, in a complex society and with different types of conflicts, represents the way outside the judicial system to the efficient, cheap and fast resolution of disputes.

Keywords: mediation; negotiation; resolution; voluntary procedure

1. Introduction

Mediation is linked to the concept of humanism, but paradoxically also to its decline recorded in the 20th century. This is based on the ability of human beings to find solutions to their own problems, without resorting to extreme forms of authority or

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religious ideas about good and evil. From this point of view, mediation is the last human way of resolving conflicts, based on an optimistic view of human nature. This view of man reached its peak in the 19th century. The modern era and the renaissance were distinguished by a strong preoccupation with "humanism", continuing the preoccupations of Antiquity and the Middle Ages. In the 15th century it was associated with Renaissance ideas about learning (Cremin, 2007, pp. 23-24).

The Enlightenment, with its ideas about reason, science, respect for humanity, continued its mission in the 19th century through humanism. In the 20th century you can see an erosion of the optimism of the 19th century. Marx, Freud and Darwin placed the human subject at the center of the universe, revealing its dependence on laws and external structures. The modern world has known industrial capitalism and huge scientific progress, but with these also Auschwitz, the threat of a nuclear war, the horrors of Nazism and Stalinism, neo-colonialism, Euro-centrism, racism, global warming and famine in the Third World. Thus, if the 19th century witnessed the "death of God", the 20th century is witnessing the "death of man"(Guillaume-Hofnung , 1995, p. 125).

In the opinion expressed by Arnaud Stimec, mediation is a more structured form of negotiation. This is a voluntary procedure, unless the recourse to it has not been foreseen by a contract. Mediation takes place in a flexible setting, where the mediator, in joint or separate sessions, helps the parties clarify key issues and build their agreement (Richbell, 2008, pp. 19-20).

The American writers Baruch Bush and Folger defined mediation as "an informal process in which a neutral third party, without the power to impose his solution, helps the parties in conflict to reach a mutually acceptable agreement. The authors believe that there are four different theories about mediation that influence its definition and implementation: the theory of satisfaction, the theory of social justice, the theory of transformation and the theory of oppression. The first three are positive in nature, the last is negative. The satisfaction depends on the fact that mediation is a powerful tool for satisfying human needs, putting in place a quick, efficient and cheap solution to the conflict (Bush Baruch and Folger, 2005, p. 8).

Social justice depends on the fact that mediation can unite individuals within strong communities (Moore, 1994). In terms of transformation, this is the ability of mediation to transform the quality of the conflictual interaction, so that the conflict strengthens both the relationship between the parties and the society of which they make part. The oppressive nature of mediation starts from the idea that, despite the

good intentions behind it, it proved to be "a dangerous tool for increasing the power of the state over the individual, and the power of the strong over the weak (Bush Baruch and Folger, 2005, pp. 13-15).

The basis of this idea is the concern that the informality and consensuality of the process can lead to the use of mediation as a cheap and expeditious alternative to the formal legal process, thus denying the parties (usually the poor) access to the benefits guaranteed by the court and by the legislation on the protection of human rights (Cremin, 2007, p. 20).

Special attention was paid to communication, both in the negotiation and in the mediation process. As Dipankar Sinha also states, communication is a process of negotiation (Sinha, 2005, p. 138), and implicitly also of mediation. Lawrence Grossberg, Ellen Wartella and D. Charles Whitney (Grossberg, Wartella and Charles Whitney, 1998, p. 15) are of the opinion that in its relationship with mediation, communication incorporates certain meanings given to the term mediation: reconciliation, the difference between reality and the image of its interpretation; the interpretation space between the subject and reality and the connection that creates the circuit of communication of meanings. Considering that one of the main functions of mediation is to build relationships between the parties, we share, along with N. P. Meierding, the opinion that communication is the "heart and soul" (Meierding , 2004, p. 225) of the mediation process.

2. Forms of Mediation

Three forms of mediation have been identified in specialized literature: facilitated mediation, transformative mediation and evaluative mediation.

Facilitated mediation involves guiding the parties through the communication process in which the voices, thoughts, feelings and ideas of the parties are important factors. By using this mediation model, the mediator focuses on encouraging the opinions expressed by the parties, refraining from expressing his opinion regarding a certain agreement (Lande, 2000, pp. 322-323). Leonard Riskin, the promoter of this model, believes that "the mediator who uses this mediation style has the main mission of strengthening and clarifying the communication between the parties in order to help them decide what to do" (Riskin, 1994, p. 111).

The vast majority of definitions given to mediation refer to the mediator's facilitating role, even when the term is not expressly used. The vast majority of authors define

mediation by describing the four elements that are characteristic of this mediation model (Mayer, 2004, pp. 30-33):

2.1. Orientation

Mediators using this mediation style focus on the interaction process and do not present themselves as experts, even when they are not. Furthermore, the facilitative mediator does not focus on achieving a specific outcome. He will coordinate the process by assisting the parties in deliberations. Recommendations are not prohibited, but they will not be made with respect to making a specific decision to resolve the conflict.

- Focusing on parties.

The mission of the facilitating mediator is to help the parties become good communicators and resourceful. Moreover, the autonomy of action and decision belongs to the parties. They are the ones who determine the purpose of the mediation, approve the process, evaluate the issues and information, generate options, analyze the implications of their options and decide how they want to proceed. If their legal representatives are also present, their role is to assist and advise the parties so as not to deviate from the negotiation.

- Focus on communication.

The essential purpose of the mediator who uses the facilitating model is to strengthen the communication process between the parties. To achieve this goal, the mediator must, first of all, establish effective communication between him and each of the parties. Occasionally, this involves restricting direct communication between the parties until they are ready to engage in effective communication with each other.

- Focusing on the pursued interest.

Facilitative mediators focus on helping clients examine their own needs as well as the needs of the other party. Most mediators who use the facilitative model of mediation focus on the integrative dimension of the conflict, that is, on identifying options that will help increase the degree to which the parties can get what they want. Mediators will help the parties negotiate limited resources when this is necessary.

2.2. Transformative Mediation

Transformative mediation is defined as a process in which third parties help the parties to change the quality of the conflictual interaction from a negative-destructive one to a positive-constructive one, during their exploration of the problems and the discussion of the possibilities of solving them. The role of the mediator is to help the parties to interact in a positive manner, by encouraging their capacities to deliberate, communicate and make decisions. In transformative mediation, the mediator has two essential goals: to encourage the parties in the deliberation and decision-making process; and to encourage and support the parties in each party's efforts to understand the other's perspective. This style of mediation does not ignore the significance of solving certain problems, but assumes that, if the mediator fulfills the role described above, the parties will change in a positive way, and the result will be concrete in the fact that they will find acceptable solutions to solve the the conflict. By resolving the negative conflict spiral they will begin to restore a positive mode of interaction that will allow them to move on (Baruch Bush and Ganong Pope, 2004, pp. 59-60).

2.3. Evaluative Mediation

Evaluative mediation implies the existence of an analytical process in which the mediator's attention is focused on the substance of the conflict and on what would be necessary for it to be resolved. In evaluative mediation, the mediator has an active role (Randolph Lowry , 1996, pp. 7-51). Riskin believes that the evaluation involves at least three activities: the evaluation of the parties' strengths and weaknesses; developing and proposing options for solving the case; predicting the outcome that the dispute would have in court and not in mediation (Riskin, 1996, pp. 7-51). In the specialized literature, it has been noted that there are a multitude of directions that the mediator can take in order to understand, analyze and share a certain opinion with the parties (Randolph Lowry, 2004, pp. 80-84).

- The mediator can focus on the negotiation between the parties. If the role of the parties in the mediation is to negotiate and the role of the mediator is to facilitate the negotiation, then he must focus on the negotiation. In this context, the mediator can make an objective and structured evaluation of the negotiation. The mediator can evaluate the dynamics between the parties, their movement towards the adoption of a negotiated agreement, can identify the barriers that stand in the way of the success of the negotiation stage, can appreciate the contribution of each of the parties to the negotiation, can analyze the progress recorded by them.

- The evaluation can focus on the behavior of the parties, both during and outside the negotiations. In this position, the mediator is the only one in a position to highlight those actions or behaviors that could lead to the conclusion of an agreement or that prevent it from being concluded. Behavioral assessment focuses only on analyzing those attitudes that can have an impact on a successful mediation.

- The mediator's assessment can focus on the parties' priorities, although it is quite difficult to understand what the parties' priorities are in terms of resolving the conflict and in terms of life in general. The mediator's assessment can be the key to the progress of the mediation process.

- The mediator's assessment can focus on proposed plans as solutions to end the conflict. Not all plans proposed by the parties are equally unfair or applicable to the conflict. Not all plans are equally sustainable and not all have the same level of involvement from the parties. Therefore, the mediator is the key resource in helping them analyze a particular plan in a realistic manner. Based on the experience accumulated over time by the mediator, his desire to share the evaluation of a plan with the parties may be of particular importance for their interests.

- The mediator's evaluation can focus on alternatives other than those mediated by negotiation. In fact, the understanding and correct perception of the alternative to a negotiated agreement is essential to get the parties to commit to a certain agreement. In many cases, the only reason the parties agree is that the negotiated settlement is much more attractive than the alternative. But if the alternative is more attractive, then the terms offered in the mediated agreement will not be accepted.

3. Efficiency of Mediation

Mediation cannot be successful in absolutely every context. Mediation has been found to be more effective when the intensity of the conflict is lower or more moderate. Therefore, the more strained the relationship between the two parties, the lower the likelihood of a satisfactory mediated agreement. There are a number of circumstances in which the mediator cannot complete his task: when there is a shortage of resources; when those represented in the negotiation cannot agree; when principles and rights are involved in mediation (Boncu, 2006, p. 194). In specialized literature it has been agreed that the relationship between the parties in conflict leaves its mark on the solutions proposed by the mediator (Thompson and Kim, 2000, pp.

3-14), but everything depends on the mediator's ability to evaluate the interactive potential of a situation conflicting (Thompson and Kim, 2000, pp. 3-14).

Other authors have pondered the distortions in mediators' judgments, concluding that mediators do not make win-win recommendations only when negotiators' offers have this character (Carnevale and Conlon, 1988, pp. 111-133).

In another study, the tendency of mediators to overestimate the probability of an agreement was noted. But it seems that erroneous assessments of the near outcome can be due both to the exaggeration of the mediators' own qualities, and to the mediator's underestimation of the parties' aspirations (Carnevale and Pegnetter, 1985, pp. 65-81).

The speed of the mediation intervention and its impact on the parties. It has been established in the doctrine that the high speed of intervention can displease the parties involved, that it induces the negotiators the impression of a lack of control and of the incorrectness of the procedure. However, this conclusion is in contradiction with the opinion according to which it is indicated to suppress the conflict as soon as possible after its outbreak, but also the idea that prolonged disputes end with the escalation of the conflict. “Despite the pressures that might lead managers to act quickly and decisively in organizational disputes, they must take care that their haste to resolve the conflict does not cause subordinates to feel that their rights have been violated” (Conlon and Fasolo, 1990, pp. 843-844).

Josh Arnold demonstrated how credibility depends on negotiators' perceptions of the amount of conflict information the mediator possesses. Thus, the more negotiators believe that the mediator has information about their interests and needs, the more credible they consider him. Credibility estimates have an impact on the parties' satisfaction after the mediation, on the parties' trust in the mediator, on the mediator's acceptance (Arnold, 2000, pp. 318-337).

However, credibility is not only given by the quantity and quality of information about the conflict of the mediator, but also by his expertise. It has been established in the literature that the credibility of the source of influence varies in direct proportion to its expertise. The recommendations of the professional mediator influence the negotiation behavior of the parties, while the opinions of the lay mediator keep the parties' position unchanged. The conclusion is that compared to ad hoc mediators, expert mediators prove to be much more effective (Arnold and O Conner, 1999, pp. 776-785).

4. Conclusions

Mediation is based on the cooperation of the parties and the use, by the mediator, of specific methods and techniques, based on communication and negotiation.

The mediation procedure will take place only after the conclusion of a written contract between the mediator and the conflicting parties. The mediator is entitled to receive a fee agreed with the parties.

The methods and techniques used by the mediator must exclusively serve the legitimate interests and objectives pursued by the parties in conflict. The mediator cannot impose a solution on the parties regarding the conflict subject to mediation.

The parties in conflict have the right to be assisted by a lawyer or other persons, under the conditions established by mutual agreement. During the mediation, the parties can be represented by other persons, who can make documents of disposition.

If the conflict subject to mediation presents difficult or controversial aspects of a legal nature, or from another specialized field, the mediator, with the consent of the parties, may request the point of view of a specialist in that field. When seeking the opinion of a specialist outside his office, the mediator will highlight only the disputed issues, without revealing the identity of the parties.

The claims made during mediation by the parties in conflict, as well as by the mediator, are confidential to third parties and cannot be used as evidence in a judicial or arbitration proceeding, unless the parties agree otherwise or the law provides otherwise.

If, during the mediation, a situation appears that could affect its purpose, the mediator's neutrality or impartiality, he is obliged to bring it to the attention of the parties, who will decide on maintaining or terminating the mediation contract. The mediator has the right to abstain and close the mediation procedure. In this situation, the mediator is obliged to return the fee proportional to the uncompleted mediation stages or, as the case may be, to ensure the continuation of the mediation procedure, under the conditions established by the mediation contract.

The mediation procedure is closed, as the case may be:

- by concluding an agreement between the parties following the resolution of the conflict;
- by the mediator's finding that the mediation has failed;
- by submitting the mediation contract by one of the parties.

If the parties have concluded only a partial agreement, as well as in cases of failure of mediation or submission of the mediation contract by one of the parties, any party may address the competent court or arbitration.

When the parties in conflict have reached an agreement, an agreement is drawn up that will include all the clauses agreed to by them and which has the value of a document under private signature. The agreement of the parties must not contain provisions that affect the law and public order. The understanding of the parties may be affected, under the law, by terms and conditions.

The mediation agreement drawn up by the mediator, in the context of a conflict that concerned the transfer of ownership of real estate, as well as other real rights, shares and succession cases, will be presented, under penalty of nullity, to the notary public or the court, so that they after verifying the substantive and formal conditions, to issue an authentic document or a court decision.

If the parties address the court, the jurisdiction belongs either to the court in whose district the domicile or residence of any of the parties is, or to the court in whose district the place where the mediation agreement was concluded is located.

The request addressed to the court, regarding the pronouncement of a decision that confirms the understanding of the parties resulting from the mediation agreement, is exempt from stamp duty, except that the mediation agreement concerns the transfer of ownership of an immovable property, other real rights, shares and succession causes.

In the context of the general reform of Romanian society, the improvement of the legislative framework regarding the administration of justice, in particular the simplification and acceleration of judicial procedures, the increase in the quality of the judicial act, the relief of the courts and the reduction of costs related to a trial, undoubtedly represent an absolute priority .

Thus, in the conditions in which the traditional means of conflict resolution have become insufficient, the courts being suffocated by the huge number of files whose final resolution can be prolonged, according to the procedures, for years, and the simple pronouncement of a sentence leads, many times, when the conflicts between the parties worsen, and not when they decrease, the danger of a possible blockage in the justice system calls for the adoption of urgent measures.

The first conclusions that emerge in relation to the changes made to the law regulating the mediation procedure are that the legislator has not changed his view

on the voluntary nature of this alternative dispute resolution method, at least in the matters covered by this change , the obligation imposed by the legislator regarding only the completion of the information session regarding the mediation. Mediation did not become a mandatory procedure for resolving disputes between the parties, what the legislator imposed was only the completion of the mandatory information session regarding this procedure.

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